

1-1-2009

Ethics Review

Santa Clara Law Review

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Santa Clara Law Review, Ethics Review, *Ethics Review*, 49 SANTA CLARA L. REV. 1237 (2009).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol49/iss4/11>

This Ethics Review is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

2008 ETHICS YEAR IN REVIEW

Rockford Hearn*

I. INTRODUCTION

Balancing the needs of the public with those of individual members of the legal profession is a daunting task. Achieving that balance nevertheless represents much of the regulation of the legal profession, and 2008 proved to be no exception. In 2008, both state and national bar associations took the expected steps of clarifying existing standards through the issuance of formal opinions.¹ While the California State Bar's further work emphasized enhanced disciplinary measures and increased disclosure in an effort to protect the public, the American Bar Association worked to protect both existing and aspiring attorneys who face difficulties associated with substance abuse and other mental health issues. Each organization worked towards achieving a workable balance between protecting the public on one hand and protecting members of the legal profession on the other, two objectives which too often are viewed as mutually exclusive.

This article will examine important developments in legal ethics in California and the nation that occurred in 2008. After a brief introduction to the rules and institutions governing lawyers and the practice of law in California, Part II will examine three notable proposed rules adopted by the Board of Governors of the California State Bar in 2008. These proposals involve insurance disclosure,² disciplinary resignations and reinstatement,³ and the online posting of

* Ethics Editor, Santa Clara Law Review, Vol. 49; J.D. candidate, Santa Clara University School of Law; B.A., Political Science, University of California at San Diego. Special thanks to my father, an attorney, who taught me much about the law and everything about ethics.

1. See *infra* Parts III, IV.

2. See *infra* Part II.A.

3. See *infra* Part II.B.

misconduct charges.⁴ Part III will discuss the formal opinion issued in 2008 by the California State Bar's Standing Committee on Professional Responsibility and Conduct interpreting the California Rules of Professional Conduct as they relate to the ethical obligations of successor attorneys in contingent fee matters.⁵ Part IV then shifts the discussion to the American Bar Association with a summary of the four formal opinions issued in 2008. Subjects addressed include confidentiality in the representation of multiple clients,⁶ outsourcing,⁷ fundraising by judges for certain "therapeutic" or "problem-solving" courts,⁸ and in-house consulting on ethics issues.⁹ Part V describes an amendment to the American Bar Association Model Rules that would grant conditional admission to the practice of law to applicants who have experienced chemical dependency or mental health problems that otherwise would have rendered applicants unfit to practice law. The subsequent discussion looks at the issue of substance abuse among attorneys and the seemingly divergent directions taken by the California State Bar and the American Bar Association, as well as the broader issues these trends represent.¹⁰ While not exhaustive, these topics highlight the most notable ethical issues affecting California attorneys in 2008.

Whereas most states have adopted the American Bar Association ("ABA") Model Code¹¹ or ABA Model Rules¹² to govern attorney conduct, the California Supreme Court has adopted a different set of rules entirely, the California Rules of Professional Conduct.¹³ The conduct of California attorneys is also governed by the California Constitution;¹⁴ the State Bar Act, as codified at California Business &

4. *See infra* Part II.C.

5. *See infra* Part III.

6. *See infra* Part IV.A.

7. *See infra* Part IV.B.

8. *See infra* Part IV.C.

9. *See infra* Part IV.D.

10. *See infra* Part V.

11. MODEL CODE OF JUDICIAL CONDUCT (2008), available at http://www.abanet.org/judiciaethics/ABA_MCJC_approved.pdf.

12. MODEL RULES OF PROF'L CONDUCT (2008), available at <http://www.abanet.org/cpr/mrpc/home.html>.

13. CAL. RULES OF PROF'L CONDUCT (2008), available at http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf.

14. *See* CAL. CONST. art. VI, § 9.

Professions Code sections 6000–6228;¹⁵ the California Code of Judicial Ethics;¹⁶ the California Rules of Court;¹⁷ state and local ethics opinions; and local rules of court.

The California State Bar, established in 1927, is responsible for regulating the practice of law in California, including bar admission and attorney discipline.¹⁸ The State Bar is governed by a Board of Governors.¹⁹ There are other units of the State Bar that contribute to the many disciplinary and regulatory functions the Bar performs. The most noteworthy of these are the Office of the Chief Trial Counsel, which receives complaints made against California attorneys, investigates such complaints, and, if appropriate, prosecutes offending attorneys;²⁰ the State Bar Court, which acts as the administrative branch of the California Supreme Court in matters that involve the disciplining and regulation of California attorneys;²¹ and Professional Competence Programs, which assist the State Bar in its ongoing efforts to maintain and improve the quality of legal services provided by California attorneys.²²

15. See State Bar Act, CAL. BUS. & PROF. CODE §§ 6000–6228 (West 2003), available at <http://calbar.ca.gov/calbar/pdfs/ethics/State-Bar-Act.pdf>.

16. CAL. CODE OF JUDICIAL ETHICS (2008), available at http://www.courtinfo.ca.gov/courts/supreme/documents/ca_code_judicial_ethics.pdf.

17. CAL. RULES OF COURT (2009), available at <http://www.courtinfo.ca.gov/rules/>.

18. CAL. BUS. & PROF. CODE §§ 6000–6228 (West 2003).

19. The California State Bar Board of Governors consists of a president and twenty-two members. STATE BAR OF CAL., 2007 REPORT ON THE STATE BAR OF CALIFORNIA DISCIPLINE SYSTEM (2008) [hereinafter DISCIPLINE REPORT], available at http://calbar.ca.gov/calbar/pdfs/reports/2007_Annual-Discipline-Report.pdf. Of the twenty-two members of the board, fifteen are lawyers elected by members of the State Bar. *Id.* A sixteenth member is elected by the Board of Directors of the California Young Lawyer's Association. *Id.* The remaining six members are non-lawyer, "public" members, appointed by the Board of Governors—four appointed by the Governor, one appointed by the Senate Committee on Rules, and the last appointed by the Speaker of the Assembly. *Id.*

20. *Id.*; see also CAL. STATE BAR RULES OF PROC. tit. III, div. II (2009), available at http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=14270&id=1222.

21. DISCIPLINE REPORT, *supra* note 19, at 1; see generally The State Bar Court of California, http://www.calbar.ca.gov/state/calbar/sbc_generic.jsp?cid=13469.

22. DISCIPLINE REPORT, *supra* note 19, at 1.

II. RULES PROPOSED BY THE CALIFORNIA STATE BAR

The California Rules of Professional Conduct (the "Rules") are attorney conduct rules, the violation of which subjects an attorney to discipline. Pursuant to statute, the State Bar formulates proposals to amend the Rules and then submits them to the California Supreme Court for approval.²³ Members of the State Bar and the public may submit comments regarding matters before The California State Bar Board of Governors (the "Board of Governors") relating to the practice of law in California.²⁴ The Board of Governors votes on proposed amendments to the Rules, and, if adopted, the proposed amendments are submitted to the California Supreme Court for final approval.²⁵ The following is a discussion of notable proposals addressed by the State Bar and approved by the Board of Governors in 2008.

A. Insurance Disclosure

The Board of Governors adopted a proposal that will require lawyers, under certain circumstances, to tell their clients if they do not carry malpractice insurance.²⁶ Proposed new Rule of Professional Conduct 3-410 ends a process that began with the 2005 appointment by the State Bar of an insurance task force in response to a request by the California Supreme Court.²⁷ The new rule has faced criticism from solo practitioners and lawyers at small firms, many of whom argue that the proposed rule affects them disproportionately

23. CAL. BUS. & PROF. CODE § 6076.5(a) (West 2003).

24. State Bar of California, Public Comment, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145 ("These issues may include proposals such as amendments to the Rules of Professional Conduct and ethics opinions. Comments may be directed to the address listed on each proposal.").

25. CAL. BUS. & PROF. CODE §§ 6076-77.

26. CAL. RULES OF PROF'L CONDUCT R. 3-410 (Proposed 2007), available at http://calbar.ca.gov/calbar/pdfs/public-comment/2007/Insurance-Dis-Clean_3-410.pdf.

27. See *Board Committee Approves Another Version of Insurance Disclosure Rule*, CAL. ST. B.J., Jan. 2008, at 15, 15. In 2005, the California Supreme Court asked the State Bar to make a recommendation about insurance disclosure. *Id.* "The American Bar Association adopted a model rule in 2004 and [twenty-three] states have adopted some type of disclosure requirement." *Id.* In California, according to a demographic survey of bar members, approximately eighteen percent of attorneys are uninsured. *Possible Disclosure Rule for Uninsured Lawyers*, CAL. ST. B.J., Jan. 2006, at 3, 3.

and may ultimately reduce the availability of low-cost and pro bono services to clients who could otherwise not afford a lawyer.²⁸ Proponents argue that the rule will enhance protection of the public and, as a fact material to a potential client's decision to retain a lawyer, must be disclosed.²⁹

The rule as currently proposed requires lawyers who do not carry professional liability insurance to disclose that fact to a client (a) in writing, (b) at the time of engagement, and (c) if it is reasonably foreseeable that representation will exceed four hours.³⁰ The rule as proposed will not apply to government lawyers, in-house counsel, lawyers who have previously informed clients that they do not maintain malpractice insurance, or to lawyers who render services in an emergency.³¹ If a lawyer discontinues insurance coverage during the representation, he or she must inform the client within thirty days.³² The Board of Governors' recommendation will go to the California Supreme Court for approval, and if approved, it will become a new rule.

B. Disciplinary Resignation and Reinstatement Rules

The Board of Governors voted to tighten disciplinary rules dealing with resignation and reinstatement.³³ The California Supreme Court has expressed concern about the number of lawyers who manage to avoid disbarment by cooperating with an investigation of charges against them, a trial, and even a possible disbarment recommendation, only

28. *Finally, Board Approves an Insurance Disclosure Rule*, CAL. ST. B.J., June 2008, at 1, 14; see also *Board Committee Approves Another Version of Insurance Disclosure Rule*, *supra* note 27, at 15.

29. *Board Committee Approves Another Version of Insurance Disclosure Rule*, *supra* note 27, at 15.

30. CAL. RULES OF PROF'L CONDUCT R. 3-410(A) (Proposed 2007), available at http://calbar.ca.gov/calbar/pdfs/public-comment/2007/Insurance-Dis-Clean_3-410.pdf.

31. CAL. RULES OF PROF'L CONDUCT R. 3-410(C)-(E) (Proposed 2007), available at http://calbar.ca.gov/calbar/pdfs/public-comment/2007/Insurance-Dis-Clean_3-410.pdf.

32. CAL. RULES OF PROF'L CONDUCT R. 3-410(B) (Proposed 2007), available at http://calbar.ca.gov/calbar/pdfs/public-comment/2007/Insurance-Dis-Clean_3-410.pdf.

33. State Bar of California, Public Comment: Proposed Amendments to California Rules of Court and to the Rules of Procedure of the State Bar of California Regarding Resignations with Disciplinary Charges Pending, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=89801 (last visited Apr. 5, 2009).

to voluntarily resign before actual disbarment.³⁴ In response, the Board of Governors approved a proposal that would require a lawyer to admit to or plead no contest to pending allegations prior to resigning.³⁵ A resignation under such circumstances would be officially termed a “disciplinary resignation.”³⁶ Current procedures allow a lawyer to resign voluntarily during the initial stages of the investigatory process without admitting misconduct, thereby hiding the nature and extent of his misconduct from the public.³⁷ The Board of Governors also approved, again in response to a request for consideration from the California Supreme Court, a possible permanent bar to reinstatement for lawyers who are found culpable of specified offenses.³⁸ Implementation of both proposals is subject to approval by the California Supreme Court.

C. *Lawyer Misconduct Charges Going Online*

The Board of Governors, after long debate, voted to post on the State Bar website disciplinary charges filed against California lawyers.³⁹ The postings will be placed on the lawyer’s profile page at www.calbar.org. Listings are to be phased in, beginning with new charges, and will eventually include notice of all pending disciplinary proceedings.⁴⁰

Although such information has been available to the public since 1985, access to it is extremely limited.⁴¹ Interested members of the public requesting information of disciplinary proceedings from the State Bar can only do so by telephone or letter.⁴² If a disciplinary proceeding is in fact

34. *Board Tightens Disciplinary Resignation Rules*, CAL. ST. B.J., Apr. 2008, at 1, 1.

35. *Id.*

36. *Id.*

37. *Id.* (referring to comments by State Bar Chief Trial Counsel, Scott Drexel).

38. State Bar of California, Public Comment: Permanent Disbarment, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=94644 (last visited Apr. 5, 2009).

39. State Bar of California, Public Comment: Online Publication of Notice of Disciplinary Charges (NDC), http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=92167 (last visited Apr. 5, 2009); see also Nancy McCarthy, *Lawyer Misconduct Charges Will Go Online*, CAL. ST. B.J., Aug. 2008, at 1, 1.

40. McCarthy, *supra* note 39, at 7.

41. *Id.*

42. *Id.*

pending, the interested party must pay fifty cents per page for the notice of disciplinary charges.⁴³ This fee must be sent by check, and any relevant documents will then be mailed to the party. This process can take up to two weeks.⁴⁴ Alternatively, the interested party may make an appointment with the State Bar Court Clerk's office in Los Angeles or San Francisco to review the file in person.⁴⁵

Proponents of the change argue that it is important for the protection of the public, who can use the information in making informed decisions about the potential retention of or consultation with an attorney.⁴⁶ Opponents argue that such notifications are contrary to the presumption of innocence and can result in broad damage to an attorney's reputation prior to any finding of fault.⁴⁷ To protect against these concerns and ensure that attorneys with pending notices of disciplinary charges are treated fairly, the State Bar proposed two additional steps to posting notices of charges online.⁴⁸ The first proposal includes a general notice emphasizing that the posted notification does not constitute a finding of professional misconduct, that the attorney is presumed innocent until proven culpable in the State Bar Court, and that such culpability must be proved by clear and convincing evidence.⁴⁹ The second proposal suggests that the attorney's response to the charges be included in the posting.⁵⁰ The Board of Governors noted that while the mere filing of a notice of a disciplinary charge in no way amounts to proof of misconduct, culpability was found in ninety-one percent of all cases filed in 2006 and ninety-two percent of all cases filed in 2007.⁵¹ Although not indicative of guilt, these facts show the high degree of reliability and legitimacy of the mere filing of charges.⁵²

43. Inter-office Communication from Scott J. Drexel, Chief Trial Counsel, The State Bar of Cal., to Members of the Bd. Comm. on Regulation, Admissions and Discipline Oversight 2 (Apr. 30, 2008), *available at* <http://calbar.ca.gov/calbar/pdfs/public-comment/2008/Online-NDCs-Agenda-Item.pdf>.

44. McCarthy, *supra* note 39, at 7.

45. Inter-office Communication from Scott J. Drexel, *supra* note 43, at 2.

46. *Id.* at 4.

47. McCarthy, *supra* note 39, at 7.

48. Inter-office Communication from Scott J. Drexel, *supra* note 43, at 3.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

III. CALIFORNIA STATE BAR FORMAL OPINION

The Committee on Professional Responsibility and Conduct (the "Committee") is a standing committee of the State Bar's Board of Governors.⁵³ The Committee is primarily tasked with developing and issuing advisory ethics opinions which assist in clarifying attorneys' professional responsibilities under the California Rules of Professional Conduct (the "Rules").⁵⁴ These opinions are theoretical in nature and are not meant to be binding or dispositive of particular situations. In fact, the Committee has been barred from issuing an advisory opinion where a disciplinary action is pending.⁵⁵ Although these opinions are not binding, they have been cited in decisions of the California Supreme Court, the State Bar Court Review Department, and the state courts of appeal.⁵⁶ The Committee issued one formal opinion in 2008, of which the following discussion provides an overview.

A. The Ethical Obligations of a Successor Attorney in a Contingency Fee Matter Whose Client Instructs Him Not to Notify Prior Counsel, Who Has a Valid Lien Against the Recovery, of the Fact or Amount of the Settlement: Formal Opinion 2008-175

Formal Opinion 2008-175 addresses the ethical obligations of a successor attorney whose client in a contingency fee matter instructs him not to notify prior counsel, who has a valid lien against a recovery, of the fact or amount of a settlement.⁵⁷ The Committee concluded that successor counsel must advise the client of the adverse consequences of concealing the settlement, and should the client persist, successor counsel is both obligated and permitted to disclose the fact and the amount of the

53. The State Bar of California, Committee on Professional Responsibility and Conduct, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10130&id=1104 (last visited Mar. 31, 2009).

54. *Id.*

55. State Bar of Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1965-1 (1965).

56. The State Bar of California, Committee on Professional Responsibility and Conduct, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10133&id=1129 (last visited Mar. 31, 2009).

57. State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2008-175 (2008) [hereinafter Formal Op. 2008-175], available at <http://calbar.ca.gov/calbar/pdfs/ethics/2008-175.pdf>.

settlement, but nothing more, to prior counsel.⁵⁸

1. *Facts*

In the hypothetical fact pattern provided:

Client retains Attorney A to represent him in a legal malpractice claim against Former Attorney. A written fee agreement between Client and Attorney A stipulates that Attorney A will be paid a contingency fee of 25% of Client's recovery against Former Attorney if settled prior to the filing of a complaint, and [one-third] of any recovery obtained after suit is filed. Attorney A's fee agreement complies in all respects with Business and Professions Code section 6147 and includes a valid and enforceable charging lien.⁵⁹

Attorney A undertakes an extensive review of the underlying matter in which Former Attorney represented Client. Upon completion of that review, Attorney A advises Client of problems with the case against Former Attorney, and asks Client to authorize him to settle for \$150,000 before filing suit. Client, who believes his case against Former Attorney is worth at least \$1 million, rejects Attorney A's advice, promptly terminates Attorney A, and demands the return of his file. Attorney A complies.

Thereafter, and unbeknownst to Attorney A, Client retains Attorney B to pursue the malpractice case against Former Attorney. Attorney B's fee arrangement with Client also calls for Attorney B to receive [one-third] of any recovery after suit is filed and includes a valid charging lien. In the course of one of their early consultations, Client tells Attorney B about Attorney A's prior involvement with in the matter.

After months of intensive litigation, Client settles his malpractice case against Former Attorney for \$150,000. Attorney A is not aware that the legal malpractice case has been filed so he has not filed a notice of lien. On the defense side, no one is aware of Attorney A's lien as he was discharged prior to suit being filed. As a result, the settlement check is made payable solely to Client and

58. *Id.* at 1.

59. A charging lien is an attorney's lien for compensation against the judgment the attorney recovers for the client. *Fletcher v. Davis*, 90 P.3d 1216, 1219 (Cal. 2004).

Attorney B.

Having learned of the terms of the original fee agreement between Client and Attorney A, Attorney B presents Client with an accounting showing \$100,000 payable to Client and \$50,000 in attorney's fees to be divided between Attorney B and Attorney A.

Client endorses the \$150,000 check for deposit into Attorney B's Client Trust Account ("CTA"), demands the immediate payment of the \$100,000 due him, and signs the accounting after adding the following handwritten statement: "I authorize the payment of \$50,000 in attorneys' fees to Attorney B. I prohibit payment of any fee to Attorney A, and I prohibit Attorney B to disclose the fact or the amount of the settlement to Attorney A."

The Committee has been asked to provide guidance to Attorney B on her ethical responsibilities in this situation.⁶⁰

2. Discussion

a. *Attorney B's Ethical Responsibilities to Client Regarding Disbursement of the Undisputed Funds*

Pursuant to Rule of Professional Conduct 4-100(B)(4), an attorney must promptly pay any funds in the attorney's possession requested by the client that the client is entitled to receive.⁶¹ Per their respective contracts, both Attorney A and Attorney B were to receive one-third of any recovery after suit was filed.⁶² The total due to both is thus limited to one-third of the recovery, or \$50,000, with the amount due to Attorney A to be determined using a quantum meruit analysis.⁶³ There is no dispute as to Client's right to receive \$100,000, which represents the remaining two-thirds of the recovery, and Attorney B is therefore ethically obligated to release the

60. Formal Op. 2008-175, *supra* note 57.

61. CAL. RULES OF PROF'L CONDUCT R. 4-100(B)(4) (2008), *available at* http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf ("A member shall . . . [p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.").

62. Formal Op. 2008-175, *supra* note 57, at 2.

63. *Id.* (citing *Fracasse v. Brent*, 494 P.2d 9, 13 (Cal. 1972)).

\$100,000 to Client promptly.⁶⁴

b. *Attorney B's Ethical Responsibilities to Attorney A Regarding Disbursement of the Disputed Funds Held by Attorney B*

Although Rule 4-100(B)(4) refers only to a duty to promptly pay or deliver funds held in trust to the client, the California Supreme Court and the State Bar Court have repeatedly confirmed that the rule applies to third parties, such as lienholders, as well.⁶⁵ Thus, an attorney who holds funds on behalf of a non-client third party is a fiduciary as to that party and is governed by the Rules, even when not acting as an attorney per se in the transaction.⁶⁶ Without the consent of both parties involved who have an interest in the funds—in this case, the Client and Attorney A—Attorney B is not authorized to hold the funds in his client trust account.⁶⁷

To meet his fiduciary duty to the third party for whom the attorney holds funds in trust, the attorney has a duty to disclose to the lienholder the subject of the fiduciary obligation.⁶⁸ This duty includes a duty to notify the lienholder if a judgment is pending.⁶⁹ Failure to pay a third party lienholder promptly, without justification, constitutes a violation of Rule 4-100(B)(4).⁷⁰ Where a dispute exists about a lien which cannot be resolved through negotiations, the attorney must either pay the lien in full or take appropriate steps to resolve the dispute promptly, leaving the disputed amount in trust until the matter is resolved.⁷¹ A client's wrongful act, such as deception, does not justify a failure to

64. *Id.*; see also CAL. RULES OF PROF'L CONDUCT R. 4-100(B)(4).

65. See, e.g., *Guzzetta v. State Bar*, 741 P.2d 172, 182 (Cal. 1987); *Johnstone v. State Bar*, 410 P.2d 617, 618 (Cal. 1966) ("When an attorney receives money on behalf of a third party who is not his client, he nevertheless is a fiduciary as to such third party. Thus the funds in his possession are impressed with a trust, and his conversion of such funds is a breach of the trust.").

66. *Johnstone*, 410 P.2d at 618.

67. Formal Op. 2008-175, *supra* note 57, at 3.

68. *Id.* (citing *In re Nunez*, 2 Cal. State Bar Ct. Rptr. 196, 200-01 (1992)); see also CAL. BUS. & PROF. CODE § 6068(m) (West Supp. 2009) ("It is the duty of an attorney . . . [t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.").

69. *In re Riley*, 3 Cal. State Bar Ct. Rptr. 91, 111 (1994).

70. CAL. RULES OF PROF'L CONDUCT R. 4-100(B)(4); see Formal Op. 2008-175, *supra* note 57, at 3.

71. *In re Riley*, 3 Cal. State Bar Ct. Rptr. at 114.

promptly resolve a lienholder's claim.⁷² A valid attorney's charging lien in a contingency fee case remains valid and enforceable in the event the attorney is discharged by the client, albeit only to the extent of the reasonable value of services rendered by the attorney prior to his discharge.⁷³ Consequently, a discharged attorney, such as Attorney A, who obtains a lien in a contingency fee case may maintain a claim against a client's successor attorney who fails to honor the charging lien for (1) money had and received, (2) conversion, (3) constructive trust, and (4) intentional interference with a contractual relationship.⁷⁴ Lastly, the Committee notes that an attorney has a duty to employ those "means only as are consistent with truth."⁷⁵ An attorney in a fiduciary relationship with a third party must therefore refrain from affirmative misrepresentations and from concealing material facts.⁷⁶

*c. Attorney B's Ethical Responsibilities to Client
Regarding the Disputed Funds*

An attorney who fails to ensure the payment of a valid lien breaches both a duty to the lienholder and an ethical duty to the client to perform services competently, as refusing to ensure payment could expose the client to collection efforts.⁷⁷ Namely, such a failure exposes the client to the risk of being sued by the lienholder as well as to the costs associated with collection. This duty to perform services competently is consistent with the attorney's duty to keep a client reasonably informed about significant developments relating to the representation.⁷⁸ Based on this, Attorney B has a duty to inform Client of the risks associated with

72. *Id.* at 115.

73. Formal Op. 2008-175, *supra* note 57, at 4 (citing *Weiss v. Marcus*, 124 Cal. Rptr. 297, 303 (Ct. App. 1975)).

74. *Id.* (citing *Weiss*, 124 Cal. Rptr. at 303).

75. CAL. BUS. & PROF. CODE § 6068(d) (West Supp. 2009).

76. Formal Op. 2008-175, *supra* note 57, at 4; *see also* CAL. CIV. CODE § 1710(3) (West Supp. 2009); *Goodman v. Kennedy*, 18 Cal. 3d 335, 346-47 (1976).

77. *See In re Riley*, 3 Cal. State Bar Ct. Rptr. 91, 112 (1994); *see also* CAL. RULES OF PROF'L CONDUCT R. 3-110 (2008), *available at* http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf.

78. CAL. BUS. & PROF. CODE § 6068(m) (West Supp. 2009); CAL. RULES OF PROF'L CONDUCT R. 3-500 (2008).

concealing the settlement from Attorney A.⁷⁹ This duty includes explaining the applicable legal and ethical principles, the policies underlying those principles, and the potential adverse consequences to Client and Attorney B of pursuing the Client's chosen course of action.⁸⁰

If Client, after receiving Attorney B's advice, nevertheless insists that Attorney B conceal the settlement from Attorney A, Attorney B is nonetheless authorized to disclose the fact of the settlement to Attorney A.⁸¹ While attorneys have a statutory duty to preserve client confidentiality,⁸² the Rules recognize an exception to the rule when revealing otherwise confidential information is required by law.⁸³ Per Rule 3-100, an attorney may not reveal a client's confidential information without the client's consent "or as required by the State Bar Act, these rules, or other law."⁸⁴

d. Is Disclosure of the Receipt of Settlement Proceeds to Attorney A, Who Has a Valid Lien against Those Proceeds, Authorized or Required by the State Bar Act, the Rules of Professional Conduct, or Other Law?

Based upon the above referenced authorities, Attorney B is both authorized and required by ethical rules and case law to disclose to Attorney A the fact and amount of the settlement reached between Client and Former Attorney.⁸⁵

First, Attorney B is required by law to take the

79. Formal Op. 2008-175, *supra* note 57, at 5.

80. *Id.*

81. *Id.* at 5-6.

82. CAL. BUS. & PROF. CODE § 6068(e)(1) (West Supp. 2009) ("It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

83. CAL. RULES OF PROF'L CONDUCT R. 3-100, discussion para. 2 (2008), available at http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf.

84. *Id.* It has long been recognized that attorneys are authorized by law to disclose confidential information under certain circumstances. See, e.g., Brockway v. State Bar, 806 P.2d 308, 315 (Cal. 1991) (defending a client-initiated disciplinary proceeding); Glade v. Superior Court, 143 Cal. Rptr. 119, 125 (Ct. App. 1978) (aiding an attorney's defense to a client malpractice action); Carlson, Collins, Gordon & Bold v. Banducci, 64 Cal. Rptr. 915, 923 (Ct. App. 1967) (supporting a claim for unpaid legal fees against a client); Formal Op. 2008-175, *supra* note 57, at 5.

85. Formal Op. 2008-175, *supra* note 57, at 5.

affirmative steps necessary for Attorney A to assert any claims he has pursuant to his valid lien against the \$50,000 attorney's fee recovery.⁸⁶ To this end, Attorney B is required by law to disclose both the fact and the amount of the settlement to Attorney A. As a fiduciary to Attorney A, Attorney B has both an affirmative duty to notify Attorney A as lienholder of the settlement⁸⁷ and an affirmative duty not to conceal material facts from Attorney A.⁸⁸

Second, Attorney B is authorized by law to disclose both the fact and amount of the settlement, as disclosure is necessary for the lawful distribution of the fee.⁸⁹ Attorney B cannot unilaterally decide what portion of the \$50,000 attorney's fee to pay himself.⁹⁰ Without disclosing the fact and amount of the settlement to Attorney A, Attorney B has no basis upon which to calculate the correct percentage for his fee, which would in effect leave both attorneys uncompensated.⁹¹ California law expressly releases attorneys from the duty to maintain client secrets in order to obtain compensation for their services.⁹²

Lastly, the Committee noted that while Attorney B is both authorized and required to disclose the fact and amount of the settlement to Attorney A, there is no similar justification for Attorney B to disclose any further privileged confidential information. Such information includes the fact that Client instructed Attorney B to withhold the information regarding the settlement from Attorney A.⁹³

86. *Id.*

87. *Id.* (citing *In re Riley*, 3 Cal. State Bar Ct. Rptr. 91, 111–15 (1994); *In re Nunez*, 2 Cal. State Bar. Ct. Rptr. 196, 200–01 (1992)).

88. CAL. BUS. & PROF. CODE § 6068(d) (West Supp. 2009); CAL. CIV. CODE § 1710(3) (West Supp. 2009); CAL. RULES OF PROF'L CONDUCT R. 5-200(A) (2008).

89. Formal Op. 2008-175, *supra* note 57, at 5.

90. *Id.* at 7.

91. *Id.* at 5.

92. *See, e.g.*, *Carlson, Collins, Gordon & Bold v. Banducci*, 64 Cal. Rptr. 915, 923 (Ct. App. 1967).

93. Formal Op. 2008-175, *supra* note 57, at 6. The Committee notes that, as stated in California State Bar Opinion No. 1996-146, while a lawyer may not disclose a client's fraudulent conduct, the lawyer must be careful to avoid furthering the fraud in any way. *Id.* (citing CAL. BUS. & PROF. CODE § 6068(d) (West Supp. 2009)). Furthermore, where "a client is engaging in an ongoing fraud, the attorney 'must take care not to further the fraud in any way.'" *Id.* (citing State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1996-146). Finally, where a "fraud persists, the attorney must

3. Conclusion

The Committee concluded that an attorney may not reveal a client's confidential information except with the client's consent or as authorized or required by the State Bar Act, the Rules, or other law.⁹⁴ However, an attorney may not follow a client's instruction to withhold information regarding a settlement from a lienholder because doing so would be a breach of the attorney's fiduciary duty to the lienholder.⁹⁵ Furthermore, disclosure of both the fact and the amount of the settlement is authorized and required by law.⁹⁶ Disclosure of any other privileged confidential information conveyed to the lawyer by the client, including the client's attempt to defraud the lienholder by instructing the attorney to withhold information regarding the settlement, is forbidden.⁹⁷

IV. AMERICAN BAR ASSOCIATION FORMAL ETHICS OPINIONS

The ABA Standing Committee on Ethics and Professional Responsibility (the "ABA Committee") periodically issues ethics opinions to assist lawyers, courts, and the public in interpreting and applying the ABA Model Rules of Professional Conduct (the "Model Rules") to specific issues of legal practice and attorney-client relationships, and in interpreting and applying the ABA Model Code of Judicial Conduct to specific issues of judicial conduct.⁹⁸ While California has not adopted the Model Rules, the Model Rules may serve as guidelines absent on-point California authority or in the event of conflicting state public policy.⁹⁹ The ABA

either limit the scope of the representation to matters that do not involve participation in or furthering of the fraud, or withdraw." *Id.*

94. *Id.* at 7; CAL. RULES OF PROF'L CONDUCT R. 3-100 (2008), available at http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf.

95. Formal Op. 2008-175, *supra* note 57, at 7.

96. *Id.*

97. *Id.*

98. News Release, American Bar Association, ABA Ethics Opinion Cautions Judges of Potential Pitfalls in Fundraising for Problem-Solving Courts (Dec. 17, 2008), available at https://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=505.

99. *City and County of San Francisco v. Cobra Solutions, Inc.*, 135 P.3d 20, 29 (Cal. 2006); see also State Bar of Cal. Standing Comm. on Prof'l. Responsibility and Conduct, Formal Op. 1998-152 n.4 (1998), available at http://calbar.ca.gov/calbar/html_unclassified/ca98-152.html ("[T]he ABA Model Rules of Professional Conduct may be considered as a collateral source,

issued four formal opinions in 2008.¹⁰⁰

A. Confidentiality When a Lawyer Represents Multiple Clients in the Same or Related Matters: Formal Opinion 08-450.

ABA Formal Opinion 08-450 addressed the issue of confidentiality when an attorney represents multiple clients in the same or related matters.¹⁰¹ Starting with the decision a lawyer faces when he acquires confidential information from one client that must be revealed to another client in order to effectively carry out that representation, the opinion states that the lawyer involved may have to withdraw from one or both of the representations to avoid adversely affecting the interests of one or both of the clients.¹⁰² There must be a balance between the lawyer's duty to preserve the confidentiality of information related to the representation under Model Rule 1.6,¹⁰³ and the duty under Model Rule

particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California.").

100. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-450 (2008) [hereinafter Formal Op. 08-450]; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008) [hereinafter Formal Op. 08-451], available at <http://www.aapipara.org/File/ABA/ABA%20Outsourcing%20Opinion.pdf>; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-452 (2008) [hereinafter Formal Op. 08-452], available at <http://www.abanet.org/media/youraba/200901/08-452.pdf>; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-453 (2008) [hereinafter Formal Op. 08-453], available at <http://www.abanet.org/media/youraba/200901/08-453.pdf>.

101. Formal Op. 08-450, *supra* note 100, at 1.

102. *Id.*

103. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2008). Rule 1.6 states:
Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these

1.4(b) to provide information to a client “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹⁰⁴

The ABA Committee began with the hypothetical but common situation in which an insurance company retains an attorney to defend both an insured employer as well as one of the insured’s employees whose conduct is in question and for which the employer may be vicariously liable.¹⁰⁵ From this scenario the opinion identified two key points in time at which the potential problem of confidential information involving multiple clients must be addressed. The first is when the joint representation is commenced.¹⁰⁶ This is the best time to address the scope of the representation for each client and the preferences and intentions of the clients with regards to confidentiality.¹⁰⁷ The second point in time at which the lawyer’s duty concerning confidential information must be addressed is when the lawyer realizes that disclosure to one client may be harmful to the other.¹⁰⁸ At this time it is most important for the lawyer to resolve any conflicting obligations under Model Rules 1.6 and 1.4.¹⁰⁹

The ABA Committee found that, absent an express agreement between the lawyer and the clients that satisfies the informed consent standard set forth in Model Rule 1.6(a),¹¹⁰ the lawyer is prohibited from revealing any information that is related to the representation of a client to anyone if that information, in the hands of a third party,

Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or

(6) to comply with other law or a court order.

104. Eileen Libby, *Split Decisions: Starting out with Multiple Clients May Leave a Lawyer with No Clients in the Case*, A.B.A. J., Dec. 2008, available at http://www.abajournal.com/magazine/split_decisions.

105. Formal Op. 08-450, *supra* note 100, at 2–3.

106. *Id.* at 3.

107. *Id.*

108. *Id.* at 4.

109. *Id.*

110. See MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2008) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”).

could be harmful to the client.¹¹¹ At this point the lawyer may have no other option but to withdraw from at least one of the representations. If withholding information would cause the lawyer to violate his duty under Model Rule 1.4(b) to provide the client with the information required to make informed decisions regarding the case, the lawyer must withdraw from representing the client.¹¹² Failing to do so would result in a violation of Model Rule 1.7, which prohibits lawyers from engaging in representations that create concurrent conflicts of interest.¹¹³ Resolving the matter requires the lawyer to balance his potentially competing obligations under Model Rules 1.6 and 1.4(b). While representation for one of the clients may be possible, the lawyer may ultimately have no choice but to withdraw from representing both parties under Model Rule 1.16, which requires that the obligation to withdraw be evaluated separately with respect to each client.¹¹⁴

111. Formal Op. 08-450, *supra* note 100, at 4.

112. *Id.* at 5; see MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2008) ("[A] lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law.").

113. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2008). Rule 1.7 states:

Conflict of Interest: Current Clients:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Id.

114. Formal Op. 08-450, *supra* note 100, at 8.

B. A Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services: Formal Opinion 08-451

ABA Formal Opinion 08-451 addressed the question of outsourcing work to support services in foreign countries. Noting that U.S. law firms are sending an increasing amount of work overseas, and in particular to India, the ABA Committee found that a lawyer may outsource legal or non-legal support services provided that the lawyer remains ultimately responsible for providing the client with competent legal services as required by Model Rule 1.1.¹¹⁵ Although permitted, the Committee cautioned that outsourcing may lead to ethics violations if the arrangement is not managed properly by the U.S. law firm.¹¹⁶ The Committee identified as possible problems adhering to ethics rules requiring competence, supervision, protection of confidential information, reasonable fees, and refraining from assisting the unauthorized practice of law.¹¹⁷

Outsourcing tasks is not a new or uncommon practice for U.S. law firms, which regularly outsource tasks ranging from the reproduction of documents, to the use of computer technicians for maintenance of computer systems and information databases, to the hiring of legal research services to prepare summaries of substantive law relevant to a case at hand.¹¹⁸ This trend is an advantageous one for lawyers and clients alike. Outsourcing is an effective means of reducing costs for lawyers, and often the client, to the extent that outside individuals or services, particularly in countries such as India, can provide services at lower rates than the lawyer's own staff.¹¹⁹ In addition, outsourcing allows small firms to handle larger, labor-intensive cases that they otherwise may

115. Formal Op. 08-451, *supra* note 100, at 1; see also MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

116. Formal Op. 08-451, *supra* note 100, at 4-6.

117. *Id.*; Martha Neil, *ABA Ethics Group OKs Outsourcing, but Nixes at Least Some Fee Markups*, A.B.A. J., Aug. 25, 2008, available at http://www.abajournal.com/news/aba_ethics_group_oks_outsourcing_but_nixes_at_least_some_fee_mark_ups/.

118. Formal Op. 08-451, *supra* note 100, at 1.

119. *Id.* at 2.

not be able to handle.¹²⁰

While there is nothing inherently unethical about a lawyer outsourcing legal and non-legal services, this arrangement may lead to ethics violations if not managed properly by the U.S. firm, which will ultimately be responsible for ensuring the quality of all services provided.¹²¹ In particular, the opinion warns that lawyers outsourcing tasks must not violate the competency requirement in ABA Model Rule 1.1, which requires the lawyer to display the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."¹²² Furthermore, the ABA Committee found that Model Rules 5.1 and 5.3, which require a lawyer to ensure that work performed by others under the lawyer's supervision conforms to ethical standards, apply to tasks outsourced abroad.¹²³

The challenge, then, is for the outsourcing lawyer to first ensure that tasks are delegated to competent individuals and then to adequately and appropriately oversee the execution of the work.¹²⁴ This can be difficult, especially when the work is being done thousands of miles and several time zones away.¹²⁵ To accomplish such a task, the ABA Committee recommends that the following steps be taken by the outsourcing lawyer. First, at a minimum, reference and background checks should be conducted for all those either providing the services, both legal and non-legal, or involved in a more general sense as intermediaries, agents, and the like.¹²⁶ Review of the facilities and procedures being used may also be appropriate, possibly via a personal visit, despite the distance that may be

120. *Id.*

121. *Id.* at 2-3; see also Eileen Libby, *A Qualified Yes: U.S. Lawyers Must Manage Outsourcing Arrangements to Avoid Ethics Concerns*, A.B.A. J., Nov. 2008, available at http://www.abajournal.com/magazine/a_qualified_yes1/.

122. Formal Op. 08-451, *supra* note 100, at 2; see also Libby, *supra* note 121.

123. Formal Op. 08-451, *supra* note 100, at 2; see generally MODEL RULES OF PROF'L CONDUCT R. 5.1(b) (2008) ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."); MODEL RULES OF PROF'L CONDUCT R. 5.3 (2008) ("A lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").

124. Formal Op. 08-451, *supra* note 100, at 3.

125. Libby, *supra* note 121.

126. Formal Op. 08-451, *supra* note 100, at 3.

involved.¹²⁷ Second, the outsourcing lawyer must evaluate whether the system of legal education under which the outsourced lawyers were trained, as well as the regulatory framework governing the lawyers involved, is compatible with U.S. standards.¹²⁸ Third, the lawyer should analyze the legal landscape of the nation where the work is being outsourced, particularly to determine whether legal documents and other materials are at risk of being seized despite claims of confidentiality, as well as the remedies available to the lawyer seeking to avoid prejudice to the client.¹²⁹

Furthermore, the ABA Committee listed additional considerations including the possible need for client consent, the protection of confidential information, the charging of reasonable fees, and avoiding assisting the unauthorized practice of law.¹³⁰ First, it may be necessary for the lawyer to inform the client about the outsourcing arrangements and perhaps to obtain the client's informed consent.¹³¹ While a client is not usually entitled to notice that work is being performed by a temporary lawyer, this rule assumes that the relationship between the firm and the temporary lawyer involves a high degree of supervision and control, such that the temporary lawyer would be tantamount to an employee.¹³² If, however, the relationship between the firm and the temporary lawyer is attenuated, as would be the case when utilizing legal staff in India, confidential information may not be shared without consent.¹³³ Second, the outsourcing lawyer should take care to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other participants.¹³⁴ Written confidentiality agreements are strongly recommended.¹³⁵ Third, depending on how outsourced staff is paid, it may not be appropriate for law firms to mark up legal fees billed to

127. *Id.*

128. *Id.*

129. *Id.* at 4.

130. *Id.* at 4–6.

131. *Id.* at 4.

132. Formal Op. 08-451, *supra* note 100, at 4–5 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988)).

133. *Id.* at 5.

134. *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. n.16 (2008)).

135. *Id.*

clients for work done by outsourced lawyers, unless such a markup is a reasonable allocation of related overhead costs.¹³⁶ The principle requirement remains that the fees charged to clients be reasonable.¹³⁷ Finally, the ABA Committee warns that if it finds that activities of a lawyer, nonlawyer, or an intermediary employed in an outsourcing capacity violates the prohibition on the unauthorized practice of law, and the outsourcing lawyer facilitated that violation by action or inaction, the outsourcing lawyer will have violated Model Rule 5.5(a).¹³⁸

C. Judges Soliciting Contributions for "Therapeutic" or "Problem-solving" Courts: Formal Opinion 08-452

ABA Formal Opinion 08-452 addresses the propriety, under the Model Code of Judicial Conduct ("Judicial Code"), of judges in "therapeutic" or "problem-solving" courts becoming involved in raising the funds needed to operate these courts.¹³⁹ The Committee found that while such fundraising is allowed, judges must limit their participation to activities permitted by Judicial Code Rule 3.7(A), and must be careful to ensure that their conduct does not violate Judicial Code Rules 3.1, 1.2, or 1.3.¹⁴⁰

"Therapeutic" or "problem-solving" courts include those specialized courts created to deal with the problems associated with drug, mental health, and domestic violence related charges.¹⁴¹ While staffing and physical space utilized by the courts are usually supported by regular government funding, these funds may not finance the alternative remedies that the courts often employ.¹⁴²

Judicial Code Rule 3.7, which sets out permissible and prohibited types of conduct in which a judge may participate in association with or on behalf of various types of entities,

136. *Id.* at 5-6.

137. *See* Neil, *supra* note 117.

138. Formal Op. 08-451, *supra* note 100, at 6; *see also* MODEL RULES OF PROF'L CONDUCT R 5.5 (2008) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.").

139. Formal Op. 08-451, *supra* note 100, at 1.

140. *Id.*

141. *Id.*

142. *Id.* at 2.

establishes the applicable standard.¹⁴³ Judicial Code Rule 3.7(A)(2) permits solicitations for contributions to an organization concerned with the law only when directed at members of the judge's family or other judges over whom the judge has no supervisory authority.¹⁴⁴ Judicial Code Rule 3.7(A)(5) permits a judge to make a grant application to a private, not-for-profit organization in support of his court, but only if the organization is concerned with the law, the legal system, or the administration of justice.¹⁴⁵

All activities permitted by Judicial Code Rule 3.7, relating to both direct and indirect fundraising activities, are conditioned on the conduct in question satisfying the more general requirements of Judicial Code Rule 3.1 as well as those set forth in Judicial Code Rules 1.2 and 1.3.¹⁴⁶ Judicial Code Rule 3.1 prohibits a judge from participating in any activity that will (1) interfere with the proper performance of the judge's duties; (2) lead to frequent disqualification; (3) appear to undermine the judge's "independence, integrity, or impartiality"; (4) appear to be coercive; or (5) make improper use of court premises, staff, stationery, equipment, or other resources.¹⁴⁷ Judicial Code Rule 1.2 requires that a judge act, at all times, in a manner that promotes public confidence in the independence, impartiality, and integrity of the judiciary, and prohibits conduct that creates the appearance of impropriety.¹⁴⁸ Judicial Code Rule 1.3 prohibits a judge from abusing the prestige of judicial office.¹⁴⁹ A judge's adherence

143. *Id.* at 2-3.

144. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A) (2008). The pertinent sections of Rule 3.7 state:

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority . . .

Id.

145. MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(5) (2008); *see supra* note 144.

146. Formal Op. 08-452, *supra* note 100, at 4.

147. *Id.* (citing MODEL CODE OF JUDICIAL CONDUCT R. 3.1 (2008)).

148. *Id.* (citing MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. n.5 (2008)).

149. MODEL CODE OF JUDICIAL CONDUCT R. 1.3 (2008). ("A judge shall not

to these provisions of the Code of Judicial Conduct will ensure that any fundraising efforts on behalf of special courts benefit the operation of those courts without negatively impacting the impartiality, independence, and integrity that must underlie all of the judge's activities.¹⁵⁰

D. In-House Consulting on Ethical Issues: Formal Opinion 08-453

ABA Formal Opinion 08-453 addressed the ethics issues inherent in the use of in-house ethics counsel by an attorney in the same firm seeking advice on the ethics implications of the consulting attorney's conduct.¹⁵¹ The availability of ethics counsel to whom attorneys may turn to for advice on ethics matters is undoubtedly a valuable service to both the individual lawyer and the firm. However, this type of service raises significant issues of disclosure and conflicts of interest.¹⁵²

The first issue addressed is whether Model Rule 1.6, covering confidentiality of information, authorizes the disclosure of a client's information when such information is initially disclosed during a consultation with in-house ethics counsel.¹⁵³ The ABA Committee states that such disclosures within the firm are impliedly authorized to carry out the representation per Model Rule 1.6(a).¹⁵⁴ In addition, Model Rule 1.6(b)(4) expressly permits a lawyer to disclose confidential client information to a lawyer who is not a partner or other firm employee as long as the purpose of the disclosure is to obtain advice about the lawyer's compliance with rules of professional conduct.¹⁵⁵ Consequently, unless a client expressly instructs the lawyer to limit the sharing of

abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”).

150. Formal Op. 08-452, *supra* note 100, at 6.

151. Formal Op. 08-453, *supra* note 100, at 1.

152. Debra Cassens Weiss, *ABA Ethics Opinion Warns of Issues Raised by Law Firm Ethics Counsel*, A.B.A. J., Dec. 1, 2008, available at http://www.abajournal.com/news/aba_ethics_opinion_warns_of_issues_raised_by_law_firm_ethics_counsel/.

153. Formal Op. 08-453, *supra* note 100, at 2.

154. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2008) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation.”).

155. Formal Op. 08-453, *supra* note 100, at 3.

certain information to specific lawyers in the firm, the lawyer handling the matter does not violate the duty of confidentiality by consulting within the firm about the client's matter.¹⁵⁶

Another issue presented by the use of a firm's in-house ethics counsel is whether consultation with such counsel creates a conflict of interest between the firm and its client.¹⁵⁷ This question necessarily depends upon the nature of the consultation and on the respective interests of the firm and the client at the time.¹⁵⁸ A lawyer's interest in conforming his conduct to applicable standards is not an interest that will materially limit the lawyer's ability to represent the client.¹⁵⁹ Similarly, the resulting consultation serves the legitimate purpose of allowing the lawyer to better advise the client as to the legality and wisdom of any proposed course of action.¹⁶⁰ The lawyer's consultation in these circumstances does not present a conflict. On the other hand, when the primary reason for the consultation is to protect the interests of the consulting lawyer or the firm—for example, for some misconduct already committed—there may be a much higher risk that the consulting lawyer's representation of the client will be materially limited.¹⁶¹

A third issue discussed in the opinion is the importance of identifying the specific relationship between the ethics counsel, the law firm, and the consulting attorney when seeking in-house ethics consultation.¹⁶² Model Rule 1.13(a) states that a lawyer employed or retained by an organization represents that organization rather than any of its individual constituents.¹⁶³ In general, then, ethics counsel represents the firm rather than an individual lawyer seeking advice.¹⁶⁴

156. *Id.* at 2–3.

157. *Id.* at 3.

158. *Id.*

159. *Id.* On the contrary, an attorney's effort to conform his conduct to applicable standards "is inherent in that representation and a required part of the work of carrying out the representation. It is, in other words, not an interest that 'affects' the lawyer's exercise of independent professional judgment, but rather is an inherent part of that judgment." *Id.* at 4 (citing N.Y. State Bar Ass'n. Comm. on Prof'l Eth. Op. 789 (2005)).

160. Formal Op. 08-453, *supra* note 100, at 4.

161. *Id.*

162. *Id.*

163. *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2008)).

164. *Id.* at 4–5.

However, if the interests of the consulting lawyer and the firm are reasonably believed not to conflict, the ethics counsel may appropriately agree to represent the consulting lawyer individually.¹⁶⁵

With regards to disclosure, while not prohibited, normally the firm would not be required to reveal that its advice stems from an ethics consultation.¹⁶⁶ In some circumstances, ethics counsel may be required to disclose the misconduct of a consulting lawyer to the law firm's management or to external regulatory authorities.¹⁶⁷ Per Model Rule 1.13(b), a lawyer representing an organization—a firm for instance— must take appropriate action to protect the organization when the lawyer has knowledge that a person associated with the organization is acting unlawfully and might cause substantial injury to the organization.¹⁶⁸ Ethics counsel will therefore be expected to report to senior management any serious violations the ethics counsel discovers.¹⁶⁹ Finally, concerning mandatory disclosure, Model Rule 8.3 requires an attorney to disclose to the appropriate disciplinary authority the fact that another lawyer has committed a violation of the rules “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”¹⁷⁰ Mandatory disclosure is generally reserved for the most egregious cases

165. *Id.* at 5.

166. Formal Op. 08-452, *supra* note 100, at 6–7.

167. *Id.* at 6.

168. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2008). Rule 1.13, subsection (b) states:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Id.

169. Formal Op. 08-453, *supra* note 100, at 6.

170. *Id.* at 7 (quoting MODEL RULES OF PROF'L CONDUCT R. 8.3 (2008)).

of lawyer misconduct.¹⁷¹

V. AMERICAN BAR ASSOCIATION'S NEW MODEL RULE REGARDING CONDITIONAL ADMISSION TO THE BAR

Recent years have seen increasing numbers of attorneys whose ability to practice law is impaired by substance abuse, depression and other mental health issues, as well as significant substance abuse reported amongst law students.¹⁷² In response, the ABA has adopted a new model rule that would grant conditional admission to practice law to applicants who have experienced substance abuse or mental health issues that would otherwise have rendered them unfit to practice law.¹⁷³ The new rule would allow recent law school graduates who have experienced chemical dependency, mental illness or any other condition that the court deems appropriate, to be admitted to practice law on a conditional basis if they have had rehabilitation for their specific issue and otherwise satisfy all essential eligibility requirements for admission to practice law.¹⁷⁴ The rehabilitation undertaken must have been sufficiently recent such that protection of the public would require monitoring of the applicant for a specified period.¹⁷⁵ The order granting conditional admission would be confidential and would not exceed sixty months.¹⁷⁶

The ABA stressed that conditional admission is not intended as a method of achieving fitness, but rather as a "safety net" with which to increase the likelihood of the conditional lawyer's continuing fitness.¹⁷⁷ Such admission

171. *Id.* "It is generally agreed that reporting under [Rule 8.3] is required only when the conduct in question is egregious and 'of the type that a self-regulating profession must vigorously endeavor to prevent.'" *Id.* (quoting MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt.3 (2008)).

172. Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 531-32 (2008). "In recent years lawyer assistance programs . . . have reported an increasing number of referrals involving lawyers whose ability to practice law has been impaired by substance abuse, depression or other mental health problems." MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW 9 (2008), available at http://www.abanet.org/legal/services/downloads/colap/ABAModelRule_ConditionalAdmission_Feb2008.pdf.

173. MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, *supra* note 172, at 3.

174. *Id.*

175. *Id.*

176. *Id.* at 5.

177. *Id.* at 4.

may be conditioned on the applicant's compliance with any number of conditions designed to detect relapse or other behavior that could render the applicant unfit to practice law, and more generally to protect the client and the public.¹⁷⁸ Requirements may include completion of alcohol, drug, or mental health treatment; medical, psychological or psychiatric care; group therapy or other comparable support; random drug and alcohol testing; office practice or debt management counseling; and monitoring, supervision, mentoring, or other conditions that the admissions authority may deem appropriate.¹⁷⁹

Opponents of the new rule argue that this type of effort to assist lawyers with dependency and mental health problems undercuts the legal profession's primary commitment to clients.¹⁸⁰ The new rule, they argue, would allow lawyers to represent clients even though they may later prove unfit to practice, with clients having no access to the confidential order of conditional admission.¹⁸¹ Under the principles of the legal profession, opponents argue, "the public interest predominates."¹⁸² Supporters won the day however, praising the rule as an attempt at encouraging law school graduates to seek help for substance abuse and mental health issues without fear that such treatment will be revealed to clients or prohibit them from admittance to state bar associations.¹⁸³ Without the rule, applicants would be tempted to hide their dependency or mental health difficulties, fearing that they would be rejected from admittance, and would be therefore less likely to seek treatment.¹⁸⁴

Given the statistics currently available, the ABA is moving in the right direction. While precise data is difficult to obtain, information from various sources indicates that lawyers suffer from substance abuse, depression and other

178. *Id.*

179. MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, *supra* note 172, at 4.

180. James Podgers, *Endorsing Early Treatment: Conditional Bar Admission Aims to Encourage Timely Help*, A.B.A. J., Mar. 2008, available at http://www.abajournal.com/magazine/endorsing_early_treatment/.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

mental health issues at a rate higher than that of the population as a whole.¹⁸⁵ Available literature further demonstrates that these problems begin before entry into the legal profession, often in law school.¹⁸⁶ While a discussion of the causes of these conclusions is beyond the scope of this article, an empirical study concluded that:

The data and analyses presented . . . manifest a highly alarming fact: a significant percentage of practicing lawyers are experiencing a variety of significant psychological distress symptoms well beyond that expected of the general population. These symptoms are directly traceable to law study and practice. They are not exhibited when the lawyers enter law school, but emerge shortly thereafter and remain, without significant abatement, well after graduation from law school.¹⁸⁷

Even if the instances of mental illness and substance abuse were no higher than that seen in the public, the consequences of impairment can be particularly considerable to both the lawyer and the client.¹⁸⁸ Lawyers expend unusually large amounts of time and money to achieve their education and credentials, while clients' lives are often affected in significant ways by the competence, or lack thereof, of the lawyers they retain.¹⁸⁹ With the high stakes involved in the legal profession and the stigma attached to mental illness and substance abuse, individuals who deal with these problems are often reluctant to seek help.¹⁹⁰ Measures such as the ABA's new rule of conditional admission may help to curb the problem from its onset by encouraging law school students and graduates to seek out

185. Rothstein, *supra* note 172, at 532. "Estimates of the frequency of substance abuse problems . . . among lawyers range from three to thirty times that of the general population." Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 555 (1998). Studies show that the incidence of psychological problems is almost twice that of the general population. Connie J. A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 50 (1995-96).

186. Beck et al., *supra* note 185, at 2.

187. *Id.*

188. Rothstein, *supra* note 172, at 533.

189. *Id.*

190. *Id.*

treatment without fear that such treatment, and the stigma attached, will be disclosed to clients or possibly even prohibit their admission to practice law.

But is California following suit? While it remains to be seen whether California will adopt the ABA's Model Rule of Conditional Admission or a similar measure, there are signs that California is retreating from its efforts to provide attorneys suffering from addiction with the wide-ranging support and alternatives available to them in the past. These signs include restricting eligibility and cutting funding for programs which have in the past done much to assist members of the profession struggling with addiction.

A State Bar committee has suggested a series of proposals designed to tighten the rules governing the Alternative Discipline Program (the "ADP"), the State Bar's disciplinary diversion program for attorneys with substance abuse or mental health problems.¹⁹¹ The ADP is a program in which attorneys admit to misconduct but have discipline postponed and reduced if they successfully complete the Lawyers Assistance Program (the "LAP").¹⁹² The LAP is "a confidential program that provides a supportive structure for building a personal program of recovery from chemical dependency and/or mental health disorders."¹⁹³ The LAP also monitors a participant's progress both for public safety and as documentation of recovery for the professional participant.¹⁹⁴

191. Nancy McCarthy, *Prosecutors Want Tighter Rules for Discipline Diversion Program*, CAL. ST. B.J., Jan. 2008, at 8, 8. "In 2002 the ABA Commission on Lawyer Assistance Programs [(Commission)] created a new Law School Outreach Committee." MODEL RULE ON CONDITIONAL ADMISSION TO PRACTICE LAW, *supra* note 172, at 9 (2008). One of the Outreach Committee's subcommittees, the Conditional Admission subcommittee, focused its efforts on finding a means to encourage law students suffering from substance abuse, depression, and mental health issues to seek early assistance. *Id.* In 2003, the ABA Law Student Division contacted this subcommittee and voiced law students' concerns that substance abuse remains a problem affecting law students. *Id.* "The law students expressed concern about the lack of confidentiality of treatment records and law students' hesitancy to seek treatment for fear of having to disclose treatment or treatment information on bar applications." *Id.* "They also expressed the widespread perception that seeking treatment and the disclosure of such treatment would prevent them from being licensed to practice law." *Id.* at 9-10.

192. McCarthy, *supra* note 191, at 8.

193. The State Bar of California, FAQs: Lawyer Assistance Programs, http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10566&id=25561 (last visited Apr. 1, 2009).

194. *Id.*

The 2008 proposals would restrict eligibility to the ADP, require that admissions of misconduct made by lawyers in the program be made public, and make decisions made by the State Bar Court concerning the program subject to review.¹⁹⁵ Most notable of these proposals are those that would make public stipulations to misconduct by lawyers participating in the program, and those that prohibit lawyers from enrolling in the program a second time.¹⁹⁶

Similarly, State Bar funding for The Other Bar was cut off in 2008.¹⁹⁷ The Other Bar is a network of volunteer California lawyers and judges who deal with alcoholism and chemical dependency, offering assistance specifically to California lawyers, judges, and law students.¹⁹⁸ For more than thirty years, The Other Bar has provided assistance to the legal community on a personal and absolutely confidential basis.¹⁹⁹ The Other Bar's services include weekly twelve-step meetings, confidential counseling and referrals, and substance abuse continuing education and training programs.²⁰⁰ A twenty-four-hour, toll-free hotline is maintained for information, emergencies, and referrals,²⁰¹ and there is also an online discussion board that can lend support for those unable to attend meetings in person.²⁰² The State Bar has in the past provided funding to The Other Bar, although this funding, which represented roughly \$300,000 in 2007, was cut off entirely in 2008.²⁰³

This cut in budgeting is due, at least in part, to the establishment of the LAP. Bar officials believe that the LAP can handle the work traditionally performed by The Other

195. See McCarthy, *supra* note 191, at 8.

196. *Id.*

197. Telephone Interview with Robert Resner, Consultant, The Other Bar (Jan. 28, 2009).

198. The Other Bar, About Us, <http://www.otherbar.org/aboutus.html> (last visited Apr. 1, 2009).

199. Telephone Interview with Jim Heiting, President of the State Bar of California from 2005–06, President of The Other Bar from 1991–93 (Feb. 2, 2009).

200. *Id.*

201. The Other Bar, Contact Us, <http://www.otherbar.org/contactus.html> (last visited Mar. 22, 2009).

202. Jen Woods, *Attorneys Kick Addictions with Help from the Other Bar*, LAW CROSSING, Dec. 17, 2007, <http://www.lawcrossing.com/article/2583/Attorney-Kick-Addictions-with-Help-from-The-Other-Bar/>.

203. Telephone Interview with Robert Resner, *supra* note 197.

Bar.²⁰⁴ The LAP has achieved some success, and does have its advantages. Namely, it has money. As of December 31, 2007, the number of active attorneys in California was approximately 161,437.²⁰⁵ With ten dollars of each member's yearly dues going to the LAP and the ADP, funding for the programs amount to over \$1.5 million a year.²⁰⁶ Furthermore, the LAP addresses both substance abuse and mental health concerns, while The Other Bar works only with substance abuse. To bar officials, The Other Bar might seem repetitive. This, however, hides important facts about the fundamental nature and abilities of the two programs.

The most basic difference between the LAP and The Other Bar is the private nature of The Other Bar. The Other Bar was founded on strict principles of confidentiality and anonymity.²⁰⁷ For this reason, The Other Bar has often been at odds with the State Bar. The State Bar has always sought full disclosure and reporting on membership and activities, requests which The Other Bar has consistently refused over the years.²⁰⁸ This lack of compliance is, for some, the reason why the State Bar felt the need to develop its own program, one which would serve both the goals of assistance to those in need as well as disclosure.²⁰⁹ However, it is The Other Bar's strict adherence to principles of anonymity and confidentiality that has earned it the historical acceptance and absolute confidence of those seeking help, achievements that the LAP simply cannot replicate.²¹⁰

Second, while the LAP has a host of salaried professionals on staff, it does not have the manpower nor the number of willing volunteers employed by The Other Bar.²¹¹ These Other Bar consultants have the ability and flexibility to act as first responders, providing a personal one-on-one response to individuals in need of assistance. Consultants are able and prepared to respond to the individual needs of those seeking help—needs which may range from referrals to

204. Telephone Interview with Jim Heiting, *supra* note 199.

205. DISCIPLINE REPORT, *supra* note 19, at 1.

206. *State Bar Alcohol Diversion Program Starts to Take Shape*, CAL. ST. B.J., Dec. 2001, at 11, 11.

207. Telephone Interview with Jim Heiting, *supra* note 199.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

counseling or rehabilitation centers, to interventions by friends and family, or to one-on-one, lawyer-to-lawyer support.²¹² They are able and willing to provide such help at any time, day or night. Since all consultants and participants are themselves legal professionals, and most, if not all, have themselves suffered from substance abuse, they are in a unique position to empathize with those seeking support, having shared many of the same stresses and difficulties that can both lead to and result from addiction.²¹³

The LAP, as an organization employing professionals, does not have this ability. In most cases the LAP must wait until an attorney faces discipline, or at least the threat of discipline, before becoming involved.²¹⁴ The Other Bar is thus much more likely to have initiated contact with and started assisting an attorney suffering from substance abuse long before the LAP and the State Bar's disciplinary mechanisms become involved. It is important to remember that the State Bar is by nature a policing body, designed to catch people, not necessarily to help them.²¹⁵ The LAP, as an arm of the State Bar, is accordingly limited in its ability to offer help before the need for discipline. The Other Bar has no such limitations. While The Other Bar will undoubtedly continue to provide the same assistance it has for over thirty years, without State Bar funding its task will be more difficult and possibly limited in scope.²¹⁶

212. *Id.*

213. Woods, *supra* note 202.

214. Matthew J. Madalo, *Ethics Year in Review*, 42 SANTA CLARA L. REV. 1291, 1293 (2002). Speaking of the state's attorney drug court, which operates hand in hand with the lawyers assistance program and the alternative discipline program:

State Bar officials claim that they 'would like to get attorneys into the drug court early in the process,' either before charges are filed or before a full-blown prosecution takes place. But the *most likely candidates* to appear in the new drug court are attorneys who have been convicted of offenses such as driving under the influence, drug possession, or possession of drug paraphernalia.

Id. (emphasis added).

215. DISCIPLINE REPORT, *supra* note 19, at 1. One of the most important functions of the State Bar is to protect the public, the courts and the legal system from lawyers who fail to adhere to the Rules of Professional Conduct. *Id.* Most of the annual membership fees paid by California attorneys support the State Bar's public protection programs. *Id.* In 2007, of the \$58,073,000 expended from the State Bar's General Fund, \$47,207,000 was spent directly on discipline and related regulatory functions.

216. Telephone Interview with Greg Dorst, Consultant, The Other Bar (Jan.

Substance abuse and mental health issues are serious problems facing the legal profession. They affect the rendition of competent legal services to clients as well as affect the quality of life of law students and lawyers alike. Recognizing this importance, the State Bar has, for years, sought out progressive means of addressing these matters.²¹⁷ The means, while varied in their substance and implementation, started with a focus on recovery and rehabilitation of the individuals: "saving lives, saving careers, saving families."²¹⁸ Now, however, it seems as if the pendulum has swung in favor of public protection, and arguably at the cost of recovery and rehabilitation. Undoubtedly, the regulators must strike a balance between recovery and rehabilitation on the one hand, and public protection on the other. Both causes need not be mutually exclusive, as both are served well with success achieved in the former.²¹⁹

Attempts such as the ABA's new Model Rule of Conditional Admission, which promote early and effective treatment of substance abuse and mental health issues, should be encouraged. California, however, seems to be moving in the opposite direction, reversing what has in the past been a progressive avenue of dealing with lawyers with addiction issues. The LAP has achieved much success,²²⁰ but it is just one tool in what must be a more comprehensive toolbox. It is an important tool to be sure, but a relatively narrow one, unable to tackle the much broader issues at hand. For years, The Other Bar has worked in a collaborative effort with the State Bar's LAP and ADP, and has the ability to refer attorneys to the LAP if appropriate while providing other, equally important outreach and support services.

29, 2009).

217. See Nancy McCarthy, *State Bar Will Open Nation's Only Drug Court for Lawyers*, CAL. ST. B.J., July 2001, at 1, 1. For example, in 2001 the State Bar opened an attorney drug court, the only court at the time of its kind for any professional regulatory agency in the country. The drug court, designed to assist the rehabilitation of alcohol- and drug-addicted attorneys, was designed to operate hand in hand with the lawyers' assistance program and the alternative discipline programs initiated at the time. *Id.*

218. Telephone Interview with Jim Heiting, *supra* note 199.

219. *Id.*

220. See DISCIPLINE REPORT, *supra* note 19, at 9 (stating that there has been no recidivism to date among attorneys who have successfully completed the LAP).

While the success of the LAP is encouraging, the cutting of funding for The Other Bar and the proposed restriction of eligibility to the ADP risk reversing any success achieved thus far.

VI. CONCLUSION

The year 2008 has been an active one in legal ethics in California and the nation. Both the State Bar and the ABA have clarified important legal issues in the formal opinions issued in 2008, providing lawyers with valuable insight and guidance. The advancement of new proposals and policies has pitted the legal profession's interest in public protection against its equally important interest in helping practicing and aspiring attorneys in need of assistance. Both of these goals are crucial for the success of the legal profession as a whole, and striking a balance between the often competing interests is a difficult task.

However, with California's proposed new rules emphasizing increased disclosure, tighter disciplinary measures, restrictions on eligibility for diversion programs, and the cutting of funding for an organization such as The Other Bar, which has been successfully helping members of the legal community cope with addiction for over thirty years, the State Bar is shifting the balance in the wrong direction, and considerably so. While the final outcome of these proposals is yet to be seen, close attention must be paid to programs aimed at early detection and prevention rather than stricter discipline in the event of misconduct. The best way to protect the public is to stem the problem before it results in the rendition of incompetent legal services. In the long run, rehabilitation and recovery will serve to protect the public far more than the stigmatization that often accompanies disclosure and discipline.²²¹ By encouraging early treatment and recovery prior to any professional misconduct, a focus on the legal professional and his or her individual needs will best serve both the profession and the public it seeks to serve.

221. See Madalo, *supra* note 214, at 314.
